No. 75-1354

In the Supreme Court of the United States

OCTOBER TERM, 1976

TRANS WORLD AIRLINES, INC., PETITIONER

v.

ARISTEDES A. DAY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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This submission is made in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States in this case.

QUESTION PRESENTED

The United States will discuss the question whether boarding procedures that take place within an air terminal building can constitute "operations of embarking" within the meaning of Article 17 of the Warsaw Convention.

STATEMENT

Respondents brought this action in the United States District Court for the Southern District of New York to recover damages from petitioner, an air carrier, for wrongful death and personal injuries. The deaths

and injuries resulted from an armed attack by terrorists on individuals who were standing in a line in Hellenikon Airport in Athens, Greece, preparing to board petitioner's Flight 881 to New York (Pet. App. B, p. 5).

1. The boarding procedure at Hellenikon Airport was described by the district court as follows (Pet. App. B, pp. 27-28):

> These passengers could not board the aircraft unless they:
>
> 1. presented their tickets to TWA at the checking desk on the upper level;
> 2. obtained boarding passes from TWA;
> 3. obtained baggage checks from TWA;
> 4. obtained an assigned seat number from TWA;
> 5. passed through passport and currency control imposed by the Greek Government;
> 6. submitted to a search of their persons for explosives and weapons by Greek police;
> 7. submitted their carry-on baggage for similar inspection by Greek police;
> 8. walked through Gate 4 to Olympic's bus;
> 9. boarded the bus;
> 10. rode in the bus a distance of 100 yards; and
> 11. walked off the bus and onto the aircraft.
>
> * * * * *

> When [the passengers] were injured they had completed five out of eleven steps [*i.e.*, had passed through passport and currency control].

The procedure between the fifth and sixth steps described above was as follows (Pet. App. B, p. 6):

> [After] [t]he passenger * * * passed through Greek passport and currency control * * * he descended a flight of stairs into the Transit Lounge. Only passengers waiting to board international flights were allowed inside the lounge area where they were required to remain until boarding. While the traveler waited for his flight to be called, he secured his seat assignment at the transfer desk located inside the lounge. When his flight was announced, he proceeded to the designated departure gate, where he and his hand baggage were searched by Greek policemen.

The attack in this case occurred after Flight 881 had been announced, when the passengers were standing in line at the departure gate waiting to be searched (*ibid.*).

2. Respondents moved for summary judgment on the issue of liability. They claimed that petitioner was absolutely liable under the Warsaw Convention, 49 Stat. 3000, T.S. 876, and the Montreal Agreement of 1966, Agreement CAB 18900, 31 Fed. Reg. 7302.[1] Article 17 of the Warsaw Convention provides:

> The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger,

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[1]Both the Convention and the Agreement are set forth at 49 U.S.C. 1502 note.

> if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

That liability was made absolute by the Montreal Agreement, except where contributory negligence is shown, to the extent of a maximum of $75,000 per passenger. See generally Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967).

The district court granted respondents' motion for summary judgment. The court concluded, on the basis of "the totality of the circumstances * * * viewed against the background of the plain meaning of the Convention, coupled with a consideration of its historical purpose" (Pet. App. B, p. 30), that the terrorists' attack had occurred "in the course of * * * the operations of embarking," within the meaning of Article 17 of the Convention.

The court of appeals affirmed, observing (Pet. App. B, pp. 8-9; footnote omitted):

> It is clear that Article 17 does not define the period of time before passengers enter the interior of the airplane when the "operations of embarking" commence. It is, nevertheless, appropriate to consider the activities of the plaintiffs in this case as falling within the purview of this somewhat cryptic phrase. The facts disclose that at the time of the terrorist attack, the plaintiffs had already surrendered their tickets, passed through passport control, and entered the area reserved exclusively for those about to depart on international flights. They were assembled at the departure gate, virtually ready to proceed to the aircraft. The passengers were not free agents roaming at will through the terminal. They were

> required to stand in line at the direction of TWA's agents for the purpose of undergoing a weapons search which was a prerequisite to boarding. Whether one looks to the passengers' activity (which was a condition to embarkation), to the restriction of their movements, to the imminence of boarding, or even to their position adjacent to the terminal gate, we are driven to the conclusion that the plaintiffs were "in the course of embarking."

DISCUSSION

In our view, boarding procedures that take place within an air terminal building can constitute "operations of embarking" within the meaning of Article 17 of the Warsaw Convention.[2] We believe that the contrary view espoused by petitioner, *i.e.*, that the phrase "operations of embarking" refers only to those boarding procedures that take place outside the physical confines of the air terminal building, would unjustifiably restrict the intended operation of the Convention and the subsequent Montreal Agreement.

The purpose of the Warsaw Convention, as its preamble states, is to regulate "in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier." In connection with the second of its two objectives, the uniform regulation of carrier liability, the Convention specifies, *inter alia*, the

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[2]There is no dispute that an attack by terrorists constitutes an "accident" within the meaning of Article 17. See *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702 (S.D. N.Y.), affirmed, 485 F. 2d 1240 (C.A. 2). Thus the only question here is whether that accident occurred during "the course of any of the operations of embarking."

circumstances under which a presumption of liability arises (Articles 17, 18, and 19), the defenses available to the carrier to rebut that presumption (Articles 20 and 21), and the maximum monetary liability per passenger (Articles 22 and 23). Article 17 provides a presumption of liability "if the accident which caused the [injury] took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

The legislative history of the Convention is instructive as to the meaning of Article 17. The background was described by the court of appeals (Pet. App. B, p. 11; footnote omitted):

> The Warsaw Convention was the product of two international conferences, one held in Paris in 1925, and another in Warsaw in 1929. The Paris conference appointed a small committee of experts, the Comite Internationale Technique d'Experts Juridique Aeriens (CITEJA), to prepare a draft convention for consideration by the delegates at Warsaw. The version proposed by CITEJA would have extended accident coverage to passengers
>
> > from the time when [they] enter the airport of departure until the time when they exit from the airport of arrival.

At the Warsaw Conference, the delegates raised several objections to this version. Mr. Ambrosini of Italy asked whether the carrier should be presumed liable for all injuries incurred by passengers "within the limits of an aerodome" (Pet. App. E, p. 77). Mr. Pecanha of Brazil recommended that liability be presumed only "from the moment when the travelers have boarded and the goods or baggage have been delivered to the forwarder" (Pet. App. E, p. 78). In this connection, Mr. Ripert of France suggested (Pet. App. E, p. 80):

> [H]ere one would be content to employ a general formula—"during air carriage"—in leaving to the courts the duty of deciding in each case if one is within the contract of carriage.

Mr. Pecanha's and Mr. Ripert's suggestions for a general formula relating the carrier's liability for passenger injuries to the moment of boarding or the commencement of the contract of carriage were treated by the delegates as being, in effect, one and the same. Mr. de Vos, the Reporter, questioned whether such a formula would not be either too restrictive or too vague (Pet. App. E, pp. 84, 88):

> As regards passengers, it is easy to say that the liability begins when the passenger has embarked. Does this suffice? There is the case of the aircraft which is still in the hanger [*sic*], which is on the traffic apron, which is taxiiing, etc. * * * .
>
> * * * * *
>
> [S]aying that the liability of the carrier is engaged as soon as the traveler has embarked on the aircraft * * * is [no solution] at all, and facilitates nothing at all, because the judge will always have to specify the moment when the liability of the carrier begins. In effect, the passenger can have steped [*sic*] on the step-up of the aircraft, * * * and be injured by another aircraft.

Mr. Ripert answered such objections by pointing out that a formula based upon embarcation would not limit the presumption of liability to situations where the passenger had actually boarded the aircraft and that case-by-case adjudication of the scope of the presumption would be fairer than the rigid application of an arbitrary rule (Pet. App. E, p. 85):

> If [the passenger] puts his foot on the step of the stairway which leads to the interior of the aircraft, for example, the contract of carriage has commenced. It's a question of fact which the courts will have to resolve, and they are accustomed to resolving them.
>
> Why do you want, as regards air carriage, to have very precise formulae that don't exist in any other mode of carriage and which indicate when such carriage commences? The courts will decide if the carriage had commenced when the accident occured [*sic*].

The delegates then voted to reject the CITEJA proposal and to refer to the drafting committee the alternate proposal "that the liability of the carrier begins at the moment when the passenger embarks on the aircraft" (Pet. App. E, p. 90). The drafting committee subsequently prepared the present Article 17, which provides that the presumption of liability arises with respect to accidents occurring "on board the aircraft or in the course of any of the operations of embarking or disembarking." As so rewritten, Article 17 passed without further debate (Pet. App. E, p. 93).

This history clearly demonstrates that the delegates did not intend the presumption of Article 17 to cover all accidents to passengers within air terminals; such broad coverage was proposed by CITEJA and was specifically rejected. At the same time, as Mr. Ripert indicated with his example of the passenger who had only stepped onto the boarding ladder, the delegates did not intend to limit the presumption to situations where the passenger had physically entered the aircraft. Instead, the Conference adopted the intermediate position represented by Article 17—"in the course of any of the operations of embarking

or disembarking." It seems clear that, in doing so, the conference deliberately eschewed a bright-line test in favor of a more flexble formulation. Under that formulation, whether an activity constitutes "any of the operations of embarking" necessarily would be, as Mr. Ripert noted, "a question of fact which the courts will have to resolve" (Pet. App. E, p. 85).

It may well be that the delegates, or a majority of them, did not envision that "any of the operations of embarking" could take place within an air terminal. In using that phrase, undoubtedly they had in mind the boarding procedures that prevailed at the time—procedures that apparently entailed little more than walking across the traffic apron and mounting a ladder. But boarding procedures have changed enormously since 1929, and the words chosen by the delegates must be applied to circumstances different from any they could have imagined. The court of appeals correctly observed (Pet. App. B, p. 13):

> Justice Holmes's counsel concerning Contitutional construction, set forth in his opinion in *Missouri* v. *Holland*, 252 U.S. 416, 433 (1920), applies with equal force to the task of treaty interpretation:
>
> > [W]hen we are dealing with words that also are a constituent act . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.

Moreover, the delegates did not intend to freeze into the language of the Convention a test of liability reflecting the then-existing techniques of embarcation. They did not, for example, specify that liability could attach only when the passenger emerged from the air terminal or

mounted the boarding ladder, although they could easily have done so. Instead, they chose a formulation broad enough to encompass changing conditions and to allow the relevance of specific facts to be considered on a case-by-case basis.

Accordingly, it seems plain that the arbitrary rule urged by petitioner, that liability can never attach until after the passenger has emerged from the air terminal, must be rejected. It has no basis in the language of the Convention, it is not supported by the legislative history, and it is not relevant to modern conditions. Today, a boarding passenger typically moves from a waiting room through a corridor into either an enclosed ramp or a mobile lounge, and from there into the interior of the aircraft, without ever being outdoors. In such circumstances, the passage beyond the structual confines of the air terminal building would appear to have nothing but symbolic significance, if that. Standing alone, it should not be determinative of when "the operations of embarking" have begun.

In short, we believe that the question whether an accident occurred "in the course of any of the operations of embarking" must turn upon a close analysis of the particular facts and not upon the bright-line test offered by petitioner.[3] The courts below adopted "a tripartite test

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[3]It may be that the delegates at the Warsaw Conference were content to leave imprecise the outer contours of the presumption of liability because of the availability of the defense of due care under Article 20 of the Convention. Sir Alfred Dennis of Great Britain observed (Pet. App. E, p. 83), "I don't think that we should linger on the question of damage sustained on the ground, because if damage is caused on the ground in an aerodrome by the aircraft of the carrier, we are within the ambit of the Convention; but if the damage is caused by the aircraft of another company, the carrier is not liable by the terms of the Convention, considering that he offers proof that he is not at fault." Similarly, Mr. de Vos, the Reporter, pointed out that the Convention establishes "[n]ot a definitive system of liability, but simply a presumption" (Pet. App. E, p. 84). Thus prior to the adoption of the Montreal Agreement, precise delimitation of the scope of the presumption was not a matter of major importance, except insofar as Article 22 limited a carrier's liability in circumstances where the presumption applied. In that Agreement, however, the carriers waived their defense of due care under Article 20, thereby making the presumption of liability irrebuttable. This was done without any amendment to Article 17. Apparently what petitioner seeks here is a judicial redefinition of Article 17, restricting the scope of the presumption under Article 17 in a manner that might accord with what the wishes of the delegates might have been had they contemplated a regime of absolute liability. But the carriers' voluntary waiver of defenses does not provide a legal basis for judicial revision of the operative terms of the treaty. See *MacDonald* v. *Air Canada*, 439 F. 2d 1402, 1405 note (C.A. 1).

based on activity (what the plaintiffs were doing), control (at whose direction) and location" (Pet. App. B, p. 8). These factors, together with timing, *i.e.*, the temporal proximity of the accident to scheduled boarding or actual deplaning, appear to us to be the appropriate ones to be considered. The objective of the Warsaw Conference in adopting Article 17 was to identify a zone within which the carrier could fairly be made to shoulder the principal responsibility of protecting against the risk of injury to passengers, *e.g.*, a zone within which a rebuttable presumption of liability would not be unreasonable. It is consistent with that objective to consider the factors of activity, control, location, and timing in giving content to the broad language of Article 17.

For example, the process of checking in at a ticket counter ordinarily would not appear to constitute an operation of embarking: although the activity is related to embarcation, and is conducted by the carrier, under most circumstances it would seem insufficiently proximate to

actual boarding, in either time or place, to warrant characterization as an operation of embarking. On the other hand, the process of presenting a boarding pass for inspection at the point of entering an enclosed ramp leading into the aircraft would appear to constitute an operation of embarking: that activity is closely related to actual boarding in function, time, and place, and it is carried out at the specific direction of the carrier.

Intermediate situations, such as the one presented in this case, are of course more difficult. We are uncertain what conclusion we would reach if the facts of this case were presented to us as a completely original matter. At a minimum, however, we cannot say that the result reached by the courts below is clearly wrong.[4] See also *Evangelinos* v. *Trans World Airlines, Inc.*, C.A. 3, No. 75-1990, decided May 4, 1976 (also finding liability on these facts), petition for rehearing *en banc* granted, June 3, 1976. Moreover, the correct application to specific facts of a test based upon the factors of activity, control, location, and timing would not appear to be a matter warranting review by this Court.

Nor does the decision below create a conflict that should be resolved by this Court. The court of appeals' decision is, of course, in harmony with the Third Circuit's subsequent decision in *Evangelinos* v. *Trans World Airlines, Inc., supra,* and it is consistent with the earlier de-

[4]We note, moreover, that the effect of the decision below may be to induce carriers to persuade air terminal authorities to conduct weapons searches at an earlier point in the boarding process than was done at Hellenikon Airport. Earlier searches would reduce the likelihood of attacks directed at the passengers of particular flights. In this case, for example, the attackers were members of an Arab terrorist group who had "planned to attack 'Israel immigrant passengers on TWA flights going to Tel Aviv but by mistake struck * * * passengers * * * boarding the New York bound flight' " (Pet. App. B, p. 23).

cision of the First Circuit in *Mac Donald* v. *Air Canada*, 439 F. 2d 1402. In the latter case, the plaintiff had sustained an injury when she fell in the baggage claim area of an air terminal, the court held that the evidence was insufficient to establish that the fall was an "accident" within the meaning of Article 17 (439 F. 2d at 1404-1405) and that, in the alternative, the fall had not occurred during any of the operations of disembarking (439 F. 2d at 1405). The court reached the latter conclusion on the ground that the plaintiff had "reached a safe point inside of the terminal" (*ibid.*), where she was "far removed from the operation of aircraft" (*ibid.*). It seems likely that the court of appeals below would have reached the same result on those facts: although the activity of retrieving baggage is related to the process of disembarking, it is not normally performed subject to the specific direction of the carrier, and it ordinarily is removed both in time and place from the actual deplaning.[5]

Petitioner asserts (Pet. 8) that the decision below is "in direct conflict" with *Mache* v. *Air France*, Rev. Fr. Droit Aerien 311 (Cour de Cassation 1970). In that case, a passenger had been injured by falling into a water drain as he followed one of the carrier's agents across an outdoor customs area after leaving the aircraft. The lower court held that the accident had occurred in the course of the operations of disembarking and therefore that the carrier's liability was limited to 125,000 gold francs by Article 22

[5]Moreover, the First Circuit in *MacDonald* appeared to reject the contention made by petitioner here that the carrier is never liable under the Convention for accidents occurring within the air terminal. The court recognized that the question when the operations of disembarking have terminated must be answered not by reference to arbitrary rules but rather on the basis of the specific facts of a particular case; it concluded its opinion by observing that "[w]ithout determining where the exact line occurs, it had been crossed in the case at bar" (439 F. 2d at 1405).

of the Convention. The passenger appealed, contending that the operations of embarking had terminated before the accident took place and that therefore the carrier's liability was not limited. The Cour de Cassation affirmed. It found the lower court's reasoning to be "inexact" (Pet. App. D, p. 64), stating (Pet. App. D, p. 62):

> [I]f the Warsaw Convention regulates, in effect, accidents arising on the ground, in the course of the operations of embarking or of disembarking, it is only to the extent that these operations are taking place on the traffic apron * * *.

But the court affirmed on the ground that the carrier's liability nevertheless was limited by the specific terms of its contract of carriage to 125,000 gold francs. Thus, while the French court's opinion takes a more restrictive view of the scope of Article 17 than that taken by the court of appeals below, since that view appears to have been in the nature of *dictum*, the extent to which it will be adhered to in future cases may be a matter of some doubt.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

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[6] In any event, although international uniformity of construction is to be desired, especially since such uniformity was the purpose of the Convention, for the reasons stated above (pp. 5-12, *supra*), the court of appeals did not err in refusing to adopt the French court's restrictive reading of Article 17. United States courts need not defer to the decisions of foreign courts when to do so would achieve uniformity only at the cost of misconstruction.